(5)

No. 87-363

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

DONALD B. AYER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CATHERINE C. COOK
General Counsel
Federal Energy Regulatory Commission
Washington, D.C. 20426

8 pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-363

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

The court of appeals held that Section 101(b)(5) of the Natural Gas Policy Act of 1978 (NGPA or Act), 15 U.S.C. 3311(b)(5), permits a natural gas producer whose gas is qualified in more than one NGPA category to compare the prices its contracts allow it to charge at a given time for gas in each category and select the highest price. In our petition for a writ of certiorari, we contended that Section 101(b)(5) places such gas in whichever of the categories imposes the highest legal ceiling, without regard to the terms of individual producer contracts. We argued that the court of appeals' decision is contrary to the language of Section 101(b)(5), is inconsistent with the NGPA's overall approach to regulation (setting ceiling prices only, without regard to producers' contract prices), and would significantly undercut the fundamental NGPA policy of phased deregulation. We also argued that, unless the decision below is reversed, respondents would reap a tremendous windfall, ultimately at the expense of gas consumers. The points raised by respondents in no way answer our claims and warrant only brief comment.

We agree with respondents, as we stated in our petition (at 13), that Section 101(b)(5) determines the proper treatment of dual-qualified regulated-deregulated gas (Br. in Opp. 8-9) and that Section 121, 15 U.S.C. 3331, does not override Section 101(b)(5) (Br. in Opp. 13-15). We also agree (see Pet. 14) that Section 101(b)(5) does not refer "to the realm of theoretical possibilities" (Br. in Opp. 10). Respondents are wrong, however, when they assert that Section 101(b)(5) allows producers to make a choice among several applicable NGPA provisions based on individual contract prices.

Section 101(b)(5) states that, when several NGPA provisions apply, "the provision which could result in the highest price shall be applicable." The statute thus calls for a comparison of NGPA provisions, not contracts; what is to be compared are the highest prices legally permitted by each provision applicable to a given quantity of gas, not the particular prices producers have included in their contracts. Respondents support their contrary reading by rewriting the statute. They assert that the statute makes applicable the provision that "results" (Br. in Opp. 14), "actually results" (*id.* at 11), or "will result" (*id.* at 8, 16) in the highest price. But the statute requires application of the provision that "could result" in the highest price. When one of several applicable provisions declares that there are no upper limits on producer prices, that deregulating provision is the one that could result in the highest price.

Contrary to respondents' claim (Br. in Opp. 10, 12), this natural reading of Section 101(b)(5) does not at all render the provision "meaningless." The categories of natural gas defined by the NGPA are overlapping, and a rule is therefore required to determine where to place gas that is qualified in more than one category. Section 101(b)(5) furnishes the needed rule. It does so in a single sentence, referring to all cases of dual-qualified gas—including both regulated-deregulated gas and gas that is qualified for two

regulated categories. Although the result of the required comparison is always the deregulating provision in the former case, Section 101(b)(5) requires comparison of two ceiling prices in the latter case (regulated-regulated gas). Of course, our construction of Section 101(b)(5) is identical to respondents' in the regulated-regulated case, so our reading no more makes the statute meaningless than does respondents'.[1]

As we pointed out in our petition (at 15-16), a reading of Section 101(b)(5) that requires a comparison of contract prices rather than legal limits on permissible prices would be wholly at odds with Title I of the NGPA as a whole (15 U.S.C. 3311 *et seq.*), which regulates only maximum prices producers may charge and does not concern itself with contract prices (as long as they do not exceed applicable legal ceilings). While denying that their reading of Section 101(b)(5) would result in a " 'glaring anomaly' " (Br. in Opp. 12-13), respondents do not point to a single instance in which NGPA Title I determines the price a producer must charge rather than a legal maximum. Respondents seek to divert attention from this failure by asserting (*id.* at 12-13, 16) that their reading of Section 101(b)(5) would not, as a practical matter, "entangle *the Commission* in contract construction" (Br. in Opp. 12 (emphasis added)). That assertion, however, in no way denies that respondents' (and the court of appeals') view would erroneously read the *statute* as requiring contract construction.

---

[1] We do not understand how the passage from *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 334-335 (1983), that respondents quote (Br. in Opp. 10-11) supports their argument. *Mid-Louisiana* concerned the meaning of "first sale" under the NGPA, and the quoted passage merely describes the potential application of Section 101(b)(5) to certain dual-qualified gas.

Respondents have also failed to explain how their view comports with the overall statutory scheme of "phased deregulation" (124 Cong. Rec. 38361 (1978)). Respondents offer no evidence that Congress contemplated the bizarre operation of the NGPA that their view entails, under which gas producers could repeatedly transfer gas back and forth between deregulated and regulated status, depending on what category provides the most money at any particular moment.[2] The NGPA is not a permanent producer assistance statute. Rather, to the extent Congress deregulated "particular aspects of the first sale of gas, it did so because [after the specified phase-in periods] it wanted to leave determination of supply and first-sale price to the market" (*Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.* ,474 U.S. 409, 422 (1986)).[3]

---

[2] Respondents (Br. in Opp. 14) suggest that, in the current and foreseeable energy markets, producers will not be making frequent switches. But that hardly bears on whether the NGPA permits such switchbacks. Moreover, if respondents are correct, it is only because the prices set in contracts tied to the ceilings prescribed by Sections 107(c)(5) and 108, 15 U.S.C. 3317(c)(5), 3318, are so very much higher than current deregulated market prices. That large difference, of course, means that, contrary to respondents' assertion (Br. in Opp. 17-18), the court of appeals' decision, in allowing producers to charge the higher prices, has far from a minimal impact.

[3] Respondents note (Br. in Opp. 11-12) that, as we explained in our petition (at 3-4, 16), the NGPA was the product of a careful congressional compromise. They also quote several statements from the congressional floor debates (Br. in Opp. 17 n.16). Neither the compromise nature of the NGPA nor the quoted passages nor anything else in respondents' brief, however, even remotely suggests that Congress intended the operation of the NGPA respondents propose. Moreover, respondents have advanced no evidence that Congress specifically considered the possibility that the NGPA ceiling prices would exceed deregulated market prices or specifically addressed the relation between the deregulation objectives and the production-incentive objectives of the Act where they conflict.

In addition, respondents are wrong in their discussion (Br. in Opp. 16 n.15) of the Conference Committee statement that we discussed at

Finally, respondents suggest (Br. in Opp. 14, 17-18), without providing any estimate of their own, that this case has only a slight financial impact. That suggestion is both unsupported and incorrect. Contrary to respondents' assertion (*id.* at 14), the problem of dual-qualified regulated-deregulated gas will not simply disappear: as we pointed out in our petition (at 18), any deregulated new gas may also become regulated Section 108 gas as the well producing it begins to dry up. And the $300 million estimate of financial impact that we set forth in our petition (at 22) was conservative. The estimate was based on a Commission staff assessment that the potential consumer impact ranged from $300 million to $2 billion, depending on the size of the difference between the regulated and deregulated prices. In particular, the staff estimated that if the regulated price for Section 107(c)(5) tight formation gas exceeded a deregulated price by $1.00 per MMBtu, then the impact of the court of appeals' decision on consumers of such gas would exceed $1.1 billion for 1985 and 1986 alone. The regulated price-deregulated price differential for Section 107(c)(5) gas is today roughly $4.00 per MMBtu, so the impact is likely greater than originally estimated.[4]

---

page 21, note 24, of our petition. Without further elaboration, we simply note that the statement is in fact addressed to the overlap of two regulated categories – Section 108 gas, and certain Section 105 gas that is made subject to a legal maximum price (*i.e.*, that is regulated) as a result of Section 121(e) (see 15 U.S.C. 3318, 3315, 3331(e)).

[4] Contrary to respondents' assertion (Br. in Opp. 15 n.14), certain natural gas producers have previously asserted that dual-qualified regulated-deregulated gas should always be treated as deregulated. In comments filed in 1979 in the rulemaking proceeding that led to the Commission's adoption of Section 107(c)(5) pricing for tight formation gas (a copy of which has been lodged with the clerk), respondent Phillips Petroleum Company, among other producers, stated that Sec-

For the foregoing reasons, and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DONALD B. AYER
*Acting Solicitor General**

CATHERINE C. COOK
General Counsel
Federal Energy Regulatory Commission

NOVEMBER 1987

---

tion 121—the NGPA deregulation provision—required deregulation for all gas in the listed categories, regardless of whether the gas also fell within a regulated category and regardless of whether the regulated or deregulated price was higher. See Comments B-11 to B-12. The same comments, we note, also adopted our position on the second question we present in our petition (*ibid.*).

* The Solicitor General is disqualified in this case.

U.S. GOVERNMENT PRINTING OFFICE: 1987—202-037/60110